

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID FRANKLIN NASH,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 274030

Wayne Circuit Court

LC No. 06-005088-01

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct (CSC) (sexual penetration of a person 13 to 15 years old), MCL 750.520d(1)(a), delivery of marijuana to a minor, MCL 333.7401(2)(c) and MCL 333.7410(1), and furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to 12 months to 15 years' imprisonment for the CSC conviction, 90 days' incarceration for the delivery of marijuana to a minor conviction, and 30 days' incarceration for the furnishing alcohol to a minor conviction. He appeals as of right. We affirm.

Defendant first contends that the prosecution presented insufficient evidence at trial to support his CSC conviction. We disagree. When the sufficiency of the evidence is challenged, we review the evidence "in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

To secure a conviction for third-degree criminal sexual conduct, the prosecutor must prove beyond a reasonable doubt that defendant engaged in sexual penetration with a person at least 13 years of age and under than 16 years of age. MCL 750.520d(1)(a). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(p). In this case, defendant does not dispute that the victim was 15 years old on the night in question. Therefore, we must address whether a rational factfinder, viewing the evidence in the light most favorable to the prosecutor, could conclude that defendant sexually penetrated the victim.

Defendant argues that the evidence presented at trial was insufficient to secure his conviction because the victim was intoxicated on the night in question and several other

witnesses contradicted her testimony. In so arguing, defendant asks us to judge the credibility of the witnesses that testified at trial. However, the testimony supporting defendant's conviction do not contradict indisputable physical facts or laws, is not patently incredible, and does not defy physical realities. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Further, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. Therefore, we leave questions of credibility to the trier of fact and will not resolve them anew. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

In this case, the victim testified that she was drinking alcohol and smoking marijuana with defendant and that defendant placed his hand inside her pants, beneath her underwear, and on top of her vagina. After the victim pulled defendant's hand from her pants and lay down on the couch, defendant pulled off the victim's pants and underwear, got on top of her, ignored her pleas to stop, and penetrated her vagina with his penis. Although the victim testified that she was intoxicated when defendant sexually penetrated her, she also testified that she was aware of the penetration because she felt internal pain that night and the following day. Based on the victim's testimony of her first-hand experience, a rational factfinder could conclude that defendant sexually penetrated her. As a result, sufficient evidence exists to convict defendant of third-degree CSC.

Defendant also argues that the prosecutor committed two acts of misconduct, denying defendant his right to a fair and impartial trial. We disagree. First, defendant argues that the prosecutor improperly elicited hearsay testimony from Linda Beattie. In particular, defendant argues that the prosecutor improperly questioned Beattie, who had no firsthand knowledge regarding the alleged activity, and elicited from her the statement, "what happened should not have happened under any circumstances." Defendant properly challenged this line of questioning at trial, and we review de novo properly preserved allegations of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* (citations omitted).

Although the prosecutor elicited improper hearsay testimony from Beattie and continued to question her on similar subjects despite repeated warnings by the court, Beattie's testimony did not deprive defendant of a fair and impartial trial. Beattie's testimony established only that her daughter told her that the victim had been sexually assaulted. Before Beattie testified, the victim testified that she told Beattie's daughter that she was raped and that Beattie subsequently learned about the assault. Beattie's hearsay testimony was cumulative and likely had no effect on the jury's view of the victim's credibility. Furthermore, the trial court gave a curative instruction to the jury each time Beattie presented hearsay or irrelevant testimony.

[W]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant. [*People v Dennis*, 464 Mich 567, 581; 628 NW2d

502 (2001), quoting *Greer v Miller*, 483 US 756, 767 n 8; 107 S Ct 3102; 97 L Ed 2d 618 (1987).]

If Beattie’s testimony had any prejudicial effect, it was minor at most, and was properly remedied when the court provided curative instructions.

Next, defendant alleges that the prosecutor improperly stated during closing arguments, “Now, you have to go in that jury room and you have to have the courage to tell the world what he did to her.” Because defendant failed to challenge the propriety of this statement, we review this claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1990). No error requiring reversal will be found if a curative instruction could have alleviated any prejudicial effect. *People v Moorer*, 262 Mich App 64, 79; 683 NW2d 736 (2004).

“Generally, “[p]rosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). During closing arguments, a prosecutor “is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case.” *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). “Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . .” *Bahoda*, *supra* at 282. A prosecutor’s arguments must be examined in context to determine whether reversal is required. *Id.* at 283.

In this case, although defense counsel did not challenge the prosecutor’s statement, the trial court immediately interjected, instructing the jury to disregard the prosecutor’s statement and explaining again to the jury that their function in the trial was to decide questions of fact, and not to send a “message.” Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the prosecutor’s misstatement during his closing argument did not deny defendant a fair trial.¹

¹ Defendant also argues that the prosecutor committed error “by planting the prejudicial and irrelevant notion that the defendant was a gang-banger.” However, defendant neither provides a citation to the record to support his claim nor explains in any detail how this alleged misconduct denied him the right to a fair and impartial trial.

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Therefore, we decline to address this issue further.

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly